In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-797

K. G. MOORE, INC.,
PETITIONER,

v.

SIDNEY ANDERSON,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

K. G. Moore, Inc. ("KGM"), your petitioner, prays that this Court issue a writ of certiorari to review the judgment of the Appeals Court of the Commonwealth of Massachusetts in the case of *Sidney Anderson* v. *K. G. Moore, Inc.*, No. 76-372.

Opinions Below

The opinion of the Appeals Court of the Commonwealth of Massachusetts, dated May 30, 1978, is reported in 78 Mass. App. Ct. Adv. Sh. 548 and 376 N.E.2d 1238 (1978), and is set forth in Appendix A. The unreported findings of fact and conclusions of law and the judgment of the Superior Court, Norfolk County, Commonwealth of Massachusetts, are set forth in Appendices B and C, respectively.

Jurisdiction

KGM invokes the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. § 1257(3). KGM claims its rights under the Full Faith and Credit Clause (Art. IV, § 1) and the Due Process Clause (Amend. XIV, § 1) of the Constitution of the United States have been violated. The Appeals Court decision was the judgment or decree of the highest Massachusetts court in which a decision could be had.[1]

Questions Presented

1. Whether the courts of Massachusetts, in adjudicating a dispute arising out of the internal affairs of a New Hampshire closely-held corporation (having its principal place of business in New Hampshire) may disregard, and thereby fail to give "Full Faith and Credit" to, the laws of New Hampshire which are designed to protect New Hampshire corporate citizens from transactions with stockholders endangering or potentially destroying the viability of New Hampshire corporations and to protect stockholders and creditors of such corporations.

2. Whether the subsidiary findings of fact that Robert Anderson, Jr. was the nominee of his father and that KGM

[1] An application to the Supreme Judicial Court for further appellate review was denied on August 16, 1978.

did not prove it would be rendered insolvent by performance of the agreement in question were "insubstantial finding[s] screening reality" which this Court should review?

3. Whether there was a denial of "Due Process" in the failure of the Massachusetts court to give "Full Faith and Credit" to the laws of New Hampshire designed to protect New Hampshire corporate citizens as to their internal affairs and relied upon by parties doing business in New Hampshire.

Constitutional and Statutory Provisions Involved

1. United States Constitution

Article IV, Section 1.

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Amendment XIV, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States and of the State wherein deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. New Hampshire Revised Statutes Annotated

Chapter 294

"294:101 Payment to Stockholders. No loan of money shall be made by any business corporation and

no dividend shall be paid to, and no part of its capital stock shall be withdrawn by, or refunded to, any of its stockholders, when its property is insufficient or will be thereby rendered insufficient for the payment of all of its debts." 2D N.H. Rev. Stat. Ann. 434 (repl. vol. 1978).

"294:28 Treasury Stock, Power of Corporation to Acquire and Dispose of its Own Shares. A corporation formed under the provisions of this chapter shall have power to purchase, take, receive or otherwise acquire, hold, own, pledge, transfer, or otherwise dispose of its own shares, but it shall not purchase, either directly or indirectly, its own shares except out of its earned surplus, or, with the affirmative vote of the holders of at least two-thirds of all shares entitled to vote thereon, out of its capital surplus. Notwithstanding the foregoing limitation, a corporation may purchase or otherwise acquire its own shares for the purpose of: (a) eliminating fractional shares; (b) collecting or compromising indebtedness to the corporation; (c) paying dissenting shareholders entitled to payment for their shares under the provisions of this chapter; (d) effecting, subject to the other provisions of this chapter, the retirement of its redeemable shares by redemption or by purchase at a price not to exceed the redemption price; (e) in partial liquidation of the assets of the corporation." 2D N.H. Rev. Stat. Ann. 409 (repl. vol. 1978).

Statement of the Case

This petition arises out of the enforcement by the Massachusetts Courts of an alleged stock redemption agreement, formed in New Hampshire, between KGM, a closely-held New Hampshire corporation, with its principal place of

business in New Hampshire, and Sidney Anderson, a minority stockholder.[2] KGM contends that the enforcement of the agreement would destroy KGM and that such enforcement does not give "Full Faith and Credit" to New Hampshire law[3] which protects KGM from payment to its shareholders other than from earned surplus and in some cases, capital surplus and from making payments to stockholders which would render the corporation insolvent.

The Trial Court ruled that the parties had adequately raised the relevant issues of New Hampshire law,[4] but ordered specific performance of the redemption agreement.[5] On appeal, the judgment of the Trial Court was upheld,[6] principally on the ground that KGM did not have standing to invoke the protection of the applicable New Hampshire statutes.[7] There were other grounds for the court's decision which KGM contends are so unsupported by the evidence that they are "insubstantial" and "a mere screen for reality."[8] See *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941); *Craig* v. *Harney*, 331 U.S. 367, 373 (1947).

KGM first sought redress of the violation of its constitutional rights in its Application for Further Appellate Review to the Supreme Judicial Court,[9] the earliest stage of the proceedings at which the federal question clearly emerged.

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[2] App. B, ¶¶ 1, 2, 3, 32; App. A at A-1.
[3] N.H. Rev. Stat. Ann. c. 294, §§ 28 and 101.
[4] App. B, ¶ 27.
[5] App. C.
[6] App. A at A-8.
[7] App. A at A-7.
[8] These grounds include: that Robert Anderson, Jr., owner of 60 shares of KGM stock, was the "nominee" of his father and that KGM did not prove that it would be rendered insolvent by performance of the agreement. App. A n.1 at A-1 and A-6,-7.
[9] App. E at A-20.

Reasons for Granting the Writ

I. This Case Presents a Question of Public Importance.

The refusal of one state to give full faith and credit to the laws of a sister state which protect that state's closely-held corporations and regulate their internal affairs is of substantial public importance.[10] As "marriage looks to domicile" sound public policy requires the laws of a corporation's domicile to govern matters involving the rights of shareholders between and among themselves. In doing business through a corporation domiciled in, established under and governed by the laws of a particular state parties should be able to rely with confidence that the laws of the jurisdiction which created the corporation will govern its internal affairs no matter where that corporation's shareholders reside.

While there have been many decisions concerning the applicability of the Full Faith and Credit Clause to the enforcement of foreign judgments, this court has not ruled on issues arising out of the applicability of the Full Faith and Credit Clause to the enforcement of statutes and regulations of a sister state in the context of disputes between corporation and shareholder for many years.[11] In an era in which business is being subjected to

[10] Many jurisdictions have laws protecting and regulating their own closely-held corporations, see, *e.g.*, Cal. Corp. Code § 158 (1977); Me. Rev. Stat. Ann. tit. 13A, §§ 102(f), 701, 407, 607 (1974); Tex. Rev. Civ. Stat. Ann. art. 2.30-1 through 2.30-5 (Close Corporations) (Vernon 1978 Supp); Ariz Rev. Stat. Ann. tit. 10, art. 13 (Close Corporations) (1977); Ill. Ann. Stat. c. 32, §§ 1201 et. seq. (Close Corporation Act) (Smith-Hurd 1978 Supp.); Md. Code Am. art 23, tit. 4 (Close Corporations) (1957); Del. Code Ann. tit. 8, subch. XIV (Close Corporations) (1974). See generally, Henn, Handbook of the Law of Corporations, c. 10 (2d ed. 1970); O'Neal, Close Corporations, Law and Practice, c. 1 (2d ed. 1971).

[11] See Martin, Constitutional Limitations on Choice of Law, 61 Cornell L.Rev. 185 (1976); Kirgis, The Role of Due Process and Full Faith and Credit in Choice of Law, 62 Cornell L.Rev. 94, 139-42 (1976); Martin, A Reply to Professor Kirgis, 62 Cornell L. Rev. 151 (1976); see also, Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 Iowa L. Rev. 449 (1959); Overton, State Decisions in Conflict of Laws and Review by the United States Supreme Court under the Due Process Clause, 22 Ore. L.Rev. 109 (1943).

increasing regulation, further illumination of the degree to which parties may rely on the applicability of laws of a particular state is appropriate.

II. The Decision of the Appeals Court In Applying the Law of Massachusetts, Is Contrary To Decisions of This Court.

A. *When Adjudicating a Controversy Between a Foreign Closely-Held Corporation and its Shareholders, the Courts of a Forum State Must Give Full Faith and Credit to the Law of the State of Incorporation, in the Absence of Important Countervailing Local Policy Considerations.*

A statute is a "public act" to be given full faith and credit under Article IV, Section 1 of the United States Constitution. *Carroll* v. *Lanza*, 349 U.S. 408, 411 (1955); *Broderick* v. *Rosner*, 294 U.S. 629, 644 (1935); *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145, 154-55 (1932).

While there are cases in which full faith and credit need not be given to the statutes of a sister state,[12] where a controversy concerns "an incident of incorporation . . . no other state [other than the state of incorporation] properly can be said to have any public policy thereon." *Broderick* v. *Rosner, supra* at 643; *Pink* v. *A.A.A. Highway Express,*

[12] *E.g.*, states need not enforce the "penal" laws of a sister state, *Carroll* v. *Lanza, supra* at 415 (Franfurter, J., dissenting); *Broderick* v. *Rosner, supra* at 642 (dicta) and cases involving matters of local public policy; *Clay* v. *Sun Insurance Office, Ltd.*, 377 U.S. 179, 181-82 (1964); *Carroll* v. *Lanza, supra* at 412-14; *Pink* v. *A.A.A. Highway Express, Inc.*, 314 U.S. 201, 211 (1941); *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493, 503 (1939); *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487, 498, (1941).

supra at 210.[13] The reason for this rule, as stated by Mr. Justice Holmes, is that:

> "[t]he act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the state granting the incorporation." *Modern Woodmen of America* v. *Mixer,* 267 U.S. 544, 551 (1925) (Holmes, J.). See also, *Order of United Commercial Travelers* v. *Wolfe,* 331 U.S. 586, 589 (1947); *Sovereign Camp of the Woodmen of the World* v. *Bolin,* 305 U.S. 66, 75 (1938); *Supreme Council of the Royal Arcanum* v. *Green,* 237 U.S. 531, 542 (1915).

This Court has held that the due process clause of the Fourteenth Amendment compels the court of the forum state to apply the law of another state having greater interest in the matter. *Clay* v. *Sun Insurance Office, Ltd.,* 377 U.S. 179, 181-82 (1964); *Home Insurance Co.* v. *Dick,* 281 U.S. 397, 408, 411 (1930); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.,* 292 U.S. 143, 149-50 (1934). Failure to apply the applicable New Hampshire law was a violation of KGM's rights to due process.

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[13] Insofar as they relate to the facts of this case, these cases are supported by the Restatement (2d) of Conflict of Laws § 188, comments (e) (1971). Massachusetts and New Hampshire generally follow § 188. *Hutchins* v. *New England Coal Mining Co.,* 86 Mass. (4 Allen) 580 (1862) (law of state of incorporation applicable to contract of corporation). *See also, Air Technology Corp.* v. *General Electric Co.,* 347 Mass. 613, 199 N.E. 2d 538, n.13 at 546 (1964); *Consolidated Mutual Ins. Co.* v. *Radio Foods Corp.,* 108 N.H. 494, 240 A.2d 47, 49 (1968) (citing with approval § 188 as it appeared in tentative draft of the Restatement (2d) of Conflict of Laws § 332(b), comment (b) (Tent. Dr. No. 6 (1960)).

B. *The Failure by the Massachusetts Courts to Apply New Hampshire Law to this Case was Determinative of the Outcome.*

The failure to apply New Hampshire law was determinative of the outcome below. The Appeals Court held that KGM could not raise defenses based upon violations of Sections 28 and 101 of Chapter 294 of New Hampshire Revised Statutes.[14] Those statutes provide that a corporation may not redeem its stock except out of earned surplus or capital surplus or so as to render itself insolvent. The rationale for the decision of the Massachusetts court (supported by Massachusetts decisions), was that Sections 28 and 101 were enacted solely to protect the rights of creditors.[15]

New Hampshire law is to the contrary. Under New Hampshire law Sections 28 and 101 are to protect the corporation itself and its stockholders as well as creditors. A New Hampshire case, not cited or applied by the Massachusetts court is controlling. *Currier* v. *Lebanon Slate Co.,* 56 N.H. (1 Hall) 262 (1875), held that a shareholder may enjoin an insolvent corporation from using its funds to buy shares of one of its stockholders. In that decision, the court held:

> "The funds of any insolvent corporation cannot be taken to buy in a portion of its capital stock at the expense of its remaining stockholders. It would be grossly inequitable to other stockholders and a fraud upon the creditors." 56 N.H. at 267-268.

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[14] App. A. at A-7,-8.
[15] *Id.*

By denying KGM the protection afforded by the state which created it, the Massachusetts Appeals Court has decided this case in a manner inconsistent with the requirements of the Full Faith and Credit Clause and the Due Process Clause of the Constitution.

Conclusion

For the foregoing reasons, your petitioner asks that this Honorable Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX "A"

The Appeals Court

No. 76-372 May 30, 1978

SIDNEY ANDERSON
v.
K. G. MOORE, INC.

ARMSTRONG, J. The plaintiff brought this action to enforce a contract he and the defendant had executed in August, 1972. The defendant appeals from a judgment which ordered specific performance.

The defendant is an interstate trucking company incorporated under the laws of New Hampshire with a principal place of business in Nashua, New Hampshire. During the period of time material to this dispute, the corporation had 100 shares of capital stock outstanding. The plaintiff and his brother Walter were each the registered owners of 20 shares. The remaining 60 shares were owned by a third brother, Robert, although they were registered in the name of Robert's son.[1] The directors were Walter, the plaintiff, and Robert's son; Walter was the president and treasurer; the plaintiff was vice president. Notwithstanding these designations, Robert was "the dominant force in the management of the corporation;" it was he

[1] The judge found that Robert's son held the shares as nominee for Robert. The testimony which warranted that finding was to the effect that Robert made the major business decisions for the corporation, including those discussed in the opinion, notwithstanding the fact that he was, so far as the corporate records were concerned, a stranger to the corporation, being neither a director, an officer, an employee or a shareholder. His son, by contrast, had no actual involvement in the affairs of the corporation, though nominally he was the majority shareholder and one of the three directors. During the period of the events discussed in the opinion, he was a student at the University of Rhode Island.

who made the major decisions of corporate policy (as contrasted with Walter, who made the day-to-day business decisions). The defendant was only one of several corporations through which Robert conducted his various trucking enterprises.

In August, 1972, the plaintiff entered into the written contract in question with the defendant corporation. By its terms the plaintiff promised to transfer his 20 shares to the corporation and to resign as officer and director "immediately . . . upon receipt of the amount agreed to as purchase price" for the 20 shares. The corporation promised to purchase the shares; the purchase price was $100,000. The contract had been prepared by the corporations attorney in accordance with instructions from Robert.

At the time of signing the contract the plaintiff was given part payment of $25,000, a sum which had been transferred by Robert to the corporation for that purpose. The plaintiff, according to his testimony, was told that the balance of the $100,000 would follow shortly. A day or two after the signing, the plaintiff sent the defendant a letter resigning his positions as vice president and director. About three months later, for reasons which were the subject of conflicting testimony, the plaintiff returned the uncashed $25,000 check to Robert, who returned it to the corporation. The plaintiff now asks for specific performance, seeking the purchase price of $100,000. It is not disputed that he is ready, willing and able to do whatever is necessary to transfer the 20 shares registered in his name to the corporation.[2]

The principal factual question which was litigated at trial concerned the intentions of the parties in executing the contract sued on. The plaintiff testified that the con-

[2] During the time of the events described in the opinion it appears that the certificate was not in the plaintiff's hands but instead was in the hands of the corporation's attorney. Its present whereabouts is not clear from the record.

tract arose out of disputes between Walter and himself, as a result of which Robert decided that the best course was for the corporation to buy out the plaintiff's interest. Robert and Walter testified that it was part of a scheme by which Robert hoped to acquire an Interstate Commerce Commission interstate operating license held by a New Jersey trucking company. Such a transfer would require ICC approval, which could be delayed, perhaps for as long as three years, if the transferee were an operating company like the defendant. The alleged plan was to have the plaintiff ostensibly sever all ties with the defendant and to apply for approval of a transfer to himself. The $25,000 he received and the contract showing he was to receive $75,000 more were intended to convince the transferor and the ICC of his financial capacity. Robert and other members of the family would put up the remainder of the estimated $100,000 the license would cost. After a period of time the trucking enterprise thus put together would be merged with the defendant corporation and the plaintiff would be restored to his 20 shares, directorship, and vice presidency of the corporation, thus augmented by the acquisition. According to Robert, the plaintiff returned the $25,000 check in November because the acquisition plan had fallen through and thus there was no point in continuing the sham. The plaintiff did not deny the existence of a plan whereby he was to acquire the New Jersey license, with Robert's help, but denied that the corporation's purchase of his 20 shares was made contingent or independent on the success or failure of such a plan. The plaintiff testified that he returned the $25,000 as part of an oral agreement between the brothers to rescind the contract sued on, and that the brothers failed to carry out the terms of the oral agreement in that they declined to restore the plaintiff to his positions as director, vice president and employee of the corporation.

The judge believed the plaintiff and expressly indicated his disbelief of the testimony of Robert and Walter. The defendant argues that the weight of the evidence favors the version given by Robert and Walter, and that, as the evidence is reported, this court should make its own findings. *Moss* v. *Old Colony Trust Co.*, 246 Mass. 139, 144 (1923), and cases cited. But that principle is subject to the qualification that an appellate court will not ordinarily disturb a finding made by a trial judge on conflicting oral testimony. *Donahue* v. *Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 580 (1975). *Sher* v. *Malden Taxi, Inc.*, 4 Mass. App. Ct. , - (1976).[a]

The judge found that the plaintiff signed the contract in the expectation, reasonable under the circumstances, that the parties intended to carry out its terms, and that finding cannot be said to be clearly erroneous. The truth may be otherwise; but a party to a sham contract necessarily runs the risk that a court may accept the contract at face value and decline to believe that it was intended by all parties as a sham. The judge was not clearly erroneous in finding that the contract sued on was independent of any plan to acquire the interstate operating authority of the New Jersey company. Nor can the judge be said to have committed clear error in accepting the plaintiff's testimony about the existence of an agreement to rescind and the subsequent breach of that agreement.

Apart from a contention, discussed later, concerning the solvency of the corporation, the findings discussed above justify the judge's conclusion that the contract sued on is binding and enforceable, whether the question is viewed as matter of New Hampshire or Massachusetts law.[3] Procedural formalities were not observed; the board

[a] Mass. App. Ct. Adv. Sh. (1976) 746, 749-750.

[3] The defendant contends, and we assume, that the law of New Hampshire, as the State where the corporation is chartered and has its principal place of business, is controlling, but neither the parties nor we have uncovered relevant New Hampshire case-law bearing on the resolution of certain pivotal questions.

of directors did not meet to authorize the contract, notwithstanding a document signed by Walter stating that it had done so. But a formal meeting of the board of directors was not essential to the validity of the contract. *Tenney* v. *East Warren Lumber Co.*, 43 N.H. 343, 356 (1861). *Sherman* v. *Fitch*, 98 Mass. 59, 64 (1867). *Dome Realty Co.* v. *Gould*, 285 Mass. 294, 300 (1934). *Hurley* v. *Ornsteen*, 311 Mass. 477, 480 (1942). *George H. Gilbert Mfg. Co.* v. *Goldfine*, 317 Mass. 681, 686 (1945). As we credit the judge's finding that Robert's son was merely a nominee for Robert (see n.1, *supra*), it is apparent that the contract to repurchase the plaintiff's shares was known to and acquiesced in by all the then directors, officers, and shareholders of the corporation, and it was therefore enforceable as an act of the corporation. *Kidd* v. *New York Security & Trust Co.*, 75 N.H. 154, 156 (1909). *Hennessey* v. *Nelen*, 299 Mass. 569, 572-573 (1938). *Medlinsky* v. *Premium Cut Beef Co.*, 317 Mass. 25, 32 (1944). *Winchell* v. *Plywood Corp.*, 324 Mass. 171, 175-177 (1949), and cases cited. Compare *In re National Piano Co.*, 252 F. 950, 951 (D. Mass. 1918). The plaintiff's resignation as officer and director was effective notwithstanding the absence of an acceptance at a formal meeting of the board of directors.[4] See *Briggs* v. *Spaulding*, 141 U.S. 132, 154 (1891). 2 Flet-

[4] The defendant argues that the plaintiff's resignation as officer and director never became effective because his contractual duty to resign did not arise until the $100,000 purchase price was paid to him, and that never occurred. The argument seems to be predicated on an assumption that the contract in issue is unilateral in nature, imposing on the plaintiff the duty to resign and turn in his stock if and when the defendant should tender payment of the purchase price. But the contract is unambiguously bilateral, imposing on the corporation an obligation to complete the purchase. Whether the plaintiff was required to submit his resignation prior to receiving the $100,000 is thus irrelevant; the critical facts are that he did resign and is ready, willing, and able to do all acts necessary to transfer his shares to the corporation — his only remaining obligation under the contract.

cher, Cyclopedia of Corporations § 349 (perm. ed. 1965). In view of the judge's finding that the rescission agreed to was contingent on restoration of the plaintiff to the status quo ante, the failure of the condition left the plaintiff free to enforce the original contract. Compare *H.D. Watts Co.* v. *American Bond & Mortgage Co.*, 260 Mass. 599, 612 (1927), *S.C.* 267 Mass. 541, 551 (1929).

The only remaining question concerns a contention that the contract should not be enforced because it would cause the corporation to become insolvent. There can be no doubt that an agreement to purchase a part of a corporation's capital stock would be unlawful as a fraud upon creditors if the effect of the agreement would be to leave the corporation with insufficient property for the payment of all its debts. N.H. Rev. Stat. Ann. c. 294, § 101 (1966 ed.). *Donahue* v. *Rodd Electrotype Co. of New England, Inc.*, 367 Mass. at 598. But it has not been established that that is the case here. Even if we were to conclude that the evidence did not warrant the judge's fnding that the corporation would not be rendered insolvent by payment of the $100,000,[5] the corporation could not prevail in this appeal;

[5] The finding may have been based on a presumption of regularity arising from the act of the directors in authorizing the contract, or it may have been based on ample testimony that the corporation was able to draw freely on the resources of the controlling shareholders' and directors' family to raise such sums as the $25,000 paid to the plaintiff at the time of signing the contract and the estimated $175,000 which was to have been needed to purchase the interstate operating rights of the New Jersey company. If the evidence did not warrant the judge's finding, it does not, of course, follow that the judge was required to make a contrary finding. He could refuse to believe the unaudited corporate balance sheet (compare *Mountain State Steel Foundries, Inc.* v. *Commissioner of Internal Revenue*, 284 F.2d 737, 741-742 [1960]), which was prepared by an employee of the corporation and purported to show that the total shareholders' equity in the corporation was less than $100,000; moreover, the balance sheet purported to show the financial state of the corporation as of March 31, 1975, three months before trial, rather than in August, 1972, when the contract was executed. Compare *Barrett* v. *W.A. Webster Lumber Co.*, 275 Mass. 302, 308 (1931); *Scriggins* v. *Thomas Dalby Co.*, 290 Mass. 414, 416-417, 420-421 (1935). Contrast Ballantine, Corporations § 256a at 608 (1946 ed.).

for, in our opinion, it was the corporation, as the party raising the issue of insolvency as a defense to a contract it had otherwise validly entered into, which had the burden of proof on the issue. See *Crimmins* v. *Kidder Peabody Acceptance Corp.*, 282 Mass. 367, 377 (1933); contrast *Hurley* v. *Boston R.R. Holding Co.*, 315 Mass. 591, 618 (1944). Thus, it is the absence of a finding that the corporation will be rendered insolvent if it is made to honor its contract, rather than the judge's finding to the contrary, which is fatal to the defense raised.

There is a further reason the defense must fail. Section 101 of the New Hampshire statute is clearly intended for the benefit of creditors of the corporation. The defendant is not part of the class primarily intended to benefit from the protection of the statute. It has no standing to invoke the rights of a creditor for the purpose of avoiding its own contractual undertakings. 7 Cavitch, Business Organizations § 147.04[3] (1977). "Where, as here, all the stockholders and officers, with full knowledge of the facts, assented to the transaction, the corporation cannot complain that is was fraudulent." *Hennessey* v. *Nelen*, 299 Mass. at 572-573, quoting from *Dome Realty Co.* v. *Gould*, 285 Mass. at 299. See also *Columbian Insecticide Co.* v. *Driscoll*, 271 Mass. 74, 78 (1930); *Medlinsky* v. *Premium Cut Beef Co.*, 317 Mass. at 32. We do not question the principle that "the directors of a corporation act in a trust capacity in so far as . . . creditors are concerned," *Mica Prod. Co.* v. *Health*, 81 N.H. 470, 471 (1925), *Peterson* v. *John J. Reilly, Inc.*, 105 N.H. 340, 346 (1964); but we think that where all the officers, directors and shareholders of a corporation have acquiesced in an act of the corporation, the corporation itself has no independent standing to complain. Should there be, in fact, a creditor against whom the contract sued on is fraudulent, he will have a remedy in the personal liability of the directors and the plaintiff

to the amount of the assets improperly diverted from the coroprate defendant. See N.H. Rev. Stat. Ann. c. 294, §§ 102, 104 (1966 ed.); G.L. c. 156, § 37; *Calkins* v. *Wire Hardware Co.*, 267 Mass. 52, 59-60 (1929); *Moseley* v. *Briggs Realty Co.*, 320 Mass. 278, 281 (1946). See also *Richardson* v. *Devine*, 193 Mass. 336 (1907).

The defendant raises a further contention, that the transaction is in violation of N.H. Rev. Stat. Ann. c. 294, § 28 (1966 ed.), which prohibits a corporation from purchasing its own capital stock except out of earned surplus or, in some circumstances, capital surplus. This contention was not raised in the Superior Court except in support of the defendant's motions for a new trial. At that stage it presented at best a matter for the judge's discretion. *Syriopoulos* v. *Cormier*, 297 Mass. 226 (1937). *Eva-Lee, Inc.* v. *Thomson Gen. Corp.*, Mass. App. Ct. , - (1977).[b] In any event, the contention stands on the same analytical footing, and suffers from the same deficiencies of standing and burden of proof, as the related contention concerning insolvency; if § 28 is meant to provide protection not only for creditors but for other stockholders, the affected stockholders in this case were themselves the architects of the contract the corporation now seeks to avoid by invoking their rights. It is basic that the corporation cannot stand in a better position than the assenting shareholders when it invokes their rights.

Judgment affirmed.

Orders denying motions for a new trial and for relief from judgment affirmed.

[b] Mass. App. Ct. Adv. Sh. (1977) 551, 551-552.

APPENDIX "B"

NORFOLK, ss. SUPERIOR COURT
No. 11055[5]

SIDNEY ANDERSON
v.
K. G. MOORE, INC.

FINDINGS, RULINGS AND ORDER FOR JUDGMENT

This is an action for breach by defendant of a contract with plaintiff whereby defendant was to buy plaintiff's stock. In addition, the plaintiff seeks a declaration under 231A that certain documents annexed to the complaint are valid and binding, and an order that the defendant perform the terms of the contract, and damages for the breach.

FINDINGS OF FACT

1. Plaintiff is a citizen of Dedham, Massachusetts, and for many years prior to the events to be described below, was in the trucking business in various relationships with his two brothers, Walter and Robert, Sr., of Nashua, New Hampshire and Walpole, Massachusetts, respectfully. [sic]

2. Defendant K. G. Moore, Inc. is a New Hampshire corporation, control of which was acquired by defendant's brothers in 1968, and is in the trucking business.

3. Walter Anderson became president of defendant corporation and held 20 shares of stock. Robert A. Anderson, Jr., nominee for his father, Robert Anderson, Sr. held 60 shares of stock.

4. In 1969 the brothers formed Wrentham Motor Lines, of which plaintiff became the principal managing officer.

5. In April, 1971 Wrentham Motor Lines was merged into defendant K. G. Moore, Inc., at which time plaintiff

became an officer, director and employee of the defendant corporation, and acquired 20 shares of stock.

6. Plaintiff's services for defendant corporation were satisfactory until August, 1972.

7. In August, 1972 friction developed between plaintiff and Walter.

8. Robert Anderson, Sr., who represented, through his nominee, his son, Robert, Jr., the dominant force in the management of the corporation, told plaintiff he had come up with a plan whereby plaintiff no longer would have to work with Walter. He said that the plan was for plaintiff to sign documents whereby he would resign as an employee, director and officer of the defendant corporation, and would sell his stock to the corporation for $100,000.

9. Robert Anderson, Sr., further as inducement, told plaintiff that he, Robert, Sr., was negotiating for the purchase from American Export Lines in New Jersey of an I.C.C. trucking license; that if K. G. Moore sought to acquire the license directly, all of its competitors would be entitled to be heard by the I.C.C. and the matter would drag on for years. On the other hand, if plaintiff divested himself of all interest in the defendant trucking company, he could make the purchase more quickly and easily. Anderson told plaintiff, that, after a few years, the New Jersey operation would be merged into K. G. Moore, Inc., the defendant.

10. Plaintiff believed these representations, relied on them, and in expectation of receiving $100,000, signed an agreement (Exhibit 2) setting forth the terms of the purchase and sale, and a letter dated August 14, 1972 (Exhibit 1), resigning from his vice presidency and directorship of defendant corporation, effective August 17, 1972.

11. Walter Anderson, president of defendant, delivered to plaintiff a check for $25,000 (Exhibit 4) and certified

that a resolution had been adopted at a special meeting of the Board of Directors of defendant held on August 10, 1972, a quorom being present, plaintiff abstaining, voting that the corporation purchase plaintiff's 20 shares for a price of $100,000, and that president Walter Anderson be authorized to execute such agreements, contracts, or other instruments as necessary to effectuate the resolution, (Exhibit 3).

12. While the directors did not actually meet together on August 10, 1972, I find that the three, plaintiff, Walter and Robert Anderson, Jr., understood and acquiesced in the plan.

13. I find that Robert F. Anderson, Jr. was advised of the substance of the votes to be taken at the directors' meeting of 1972 and acquiesced in it.

14. The final act in the arrangement of August 1972 was a mailing by plaintiff of the resignation from his home in Dedham to defendant in New Hampshire. (Exhibit 1).

15. The defendant treated execution of Exhibit 1 by the plaintiff as a binding resignation from his position as officer, director and employee, and treated it as immediately effective.

16. Robert Anderson, Sr. told plaintiff at a series of conferences in September and November that the negotiations for the purchase of the New Jersey company had collapsed. This culminated in a meeting at Robert Anderson, Sr.'s office in Massachusetts on November 9, 1972. He induced the plaintiff to return the $25,000 check which had been given to plaintiff in return for Robert, Sr.'s promise to plaintiff to restore him to the status quo ante his resignation, i.e., restore plaintiff to his status as stockholder, director, officer and employee of defendant corporation. I find that Robert Anderson, Sr. was acting as

an authorized agent of defendant corporation during these conferences.

17. At no time subsequent to November, 1972 has plaintiff been restored to his status as employee or officer of defendant corporation; nor has he been permitted to act as director; nor was he paid any part of the $100,000.

18. In September, 1973 this suit was instituted.

19. The documents executed in August, 1972, Exhibits 1, 2 and 3, were the only occasion on which Robert Anderson, Sr., the dominant force in the corporation, had his brothers sign agreements.

20. Had the plaintiff understood at the outset that Exhibits 1, 2 and 3 were conditional on the purchase of the New Jersey company, and failing such purchase, they would be considered a nullity, there would have been no need for the several conferences in September and November between Robert Anderson and plaintiff in order to convince the plaintiff to give up his right to collect $100,000 from the defendant corporation.

21. I discredit the testimony of Robert Anderson, Sr. and Walter Anderson that these documents were necessary to convince the New Jersey company that the plaintiff was in a financial position to consummate the acquisition of the New Jersey I.C.C. license.

22. I find that there was no need for such documents until the arrangement to acquire the New Jersey corporation was near fruition, which it was not in August, 1972.

23. I find that the plan which was described to plaintiff in August, 1972 as inducement to obtain his signature, sale of stock and resignation from posts in the company, was a convenient fabrication in order to force the plaintiff out of the corporation.

24. Even if there were any truth to the story of acquiring a New Jersey corporation, and Robert Anderson, Sr. and Walter Anderson intended that the purchase of plaintiff's stock be conditioned on fruition of such arrangement, I find that this condition was not conveyed to nor acquiesced in by the plaintiff.

25. If the events of September and November, 1972 could otherwise be construed as a recision of the contract, I find that this recision was conditional on plaintiff's being restored to his status quo, i.e., as an officer, director, stockholder and employee of defendant corporation. He was at no time restored as an employee, nor as an officer. In addition, more than a reasonable time for performance has passed. I consequently find that the condition of this recision failed.

26. I find that payment of the $100,000 to plaintiff in August, 1972 would not have rendered defendant corporation insolvent.

RULINGS

27. Those issues concerning the law of New Hampshire have been adequately raised before this Court as required by Rule 44.1 of Mass. R. Civ. Proc.

28. There is no New Hampshire statute or case law on the following issues:

(a) Whether or not the resignation of a corporate officer and/or director is effective without formal corporate acceptance and placement on the corporate minutes.

(b) Whether or not a corporation is bound, despite a requirement of a special or general meeting, by a contract which is assented to by all its directors separately, where the directors hold all of the stock of the corporation.

29. When an issue or issues involve foreign law for which there is no statutory or case authority, the Court will look to its own and other states' decisions as controlling. *Gagnon Co., Inc.* v. *Nevada Desert Inn*, 45 C.2d 448, 289 P.2d, 466 (1955); *Aetna Casualty and Surety*

Company v. *Osborne McMillian Elevator Co.*, 36 W.2d 292, 132 N.W. 2d 510 (1965).

30. Sydney J. Anderson's resignation was complete and effective on August 17, 1972 as stated in his letter of resignation, without any need for formal acceptance by the board of directors and or placement on the corporate records. *Briggs* v. *Spaulding*, 141 U.S. 132 (1891); *Manhattan Co.* v. *Kaldenbury*, 165 N.Y. 1, 58 N.E. 790 (1900); 2 W. Fletcher, Cyclopedia Corporations, §349 (perm. ed. 1974).

31. Where a corporation's directors, who hold the corporation's entire stock, acquiesce separately to a purchase and sale agreement effectuated by its president-director, the contract is binding despite a failure to act formally at a special or general meeting. *Gerard et al.* v. *Empire Square Realty Co., et al.*, 187 N.Y.S. 306 (1921); *cf. Winchell* v. *Plywood Corp.*, 324 Mass. 171 (1949).

32. The attempted oral recision, in Massachusetts, of the partially performed antecedent contract formed in New Hampshire was ineffective because of failure to perform the condition of the agreement: namely, the restoring of the plaintiff to the "status quo". *H.D. Watts Co.* v. *American Bond and Mortgage Co.*, 267 Mass. 541 (1929).

(s) Robert J. Hallisey
Robert J. Hallisey
Justice of the Superior Court

Date: 8/1/75

APPENDIX "C"

Commonwealth of Massachusetts

Norfolk, ss. Superior Court
Civil Action
No. 110555

Sidney Anderson,
Plaintiff
v.
K. G. Moore, Inc.
Defendant

JUDGMENT

This action came on for hearing before the Court, Hallisey, J., presiding, and the issues having been duly tried and findings having been duly rendered,

It Is Ordered and Adjudged:

That on delivery by the plaintiff, Sidney Anderson, to the defendant of twenty (20) shares of stock of the defendant corporation, the defendant, K.G. Moore, Inc., pay plaintiff the sum of $100,000, with interest thereon from September 12, 1973, in the amount of $, and costs in the amount of $124.00.

Dated at Boston, Massachusetts, this 28th day of October, 1975.

(s) Robert J. Hallisey
Assoc. Justice

APPENDIX "D"

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

AT BOSTON, AUGUST 16, 1978

ORDER

It is hereby ORDERED, that the following Applications for Further Appellate Review are denied:

• • •

M-1020 *Sidney Anderson* v. *K.G. Moore, Inc.*
(Norfolk Superior Court No. 110555; Appeals Court No. A.C. 76-372)

• • •

By the Court,
(s) FREDERICK J. QUINLAN
Clerk

APPENDIX "E"

COMMONWEALTH OF MASSACHUSETTS

The Appeals Court

No. 76-372
NORFOLK COUNTY

SIDNEY ANDERSON,
Plaintiff-Appellee,

v.

K. G. MOORE, INC.,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

Application For Further Appellate Review

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I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

K. G. Moore, Inc. (hereinafter "KGM"), a New Hampshire corporation, pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, hereby requests further appellate review of the decision of the Appeals Court in *Anderson* v. *K.G. Moore, Inc.* (Appeals Court Docket No. 76-372, released May 30, 1978). Further appellate review is in the public interest since the decision of the Appeals Court misapprehends the New Hampshire law governing corporations which is designed to protect creditors and stockholders from corporate action which would deplete a corporation's assets to their detriment.

The court failed to give full faith and credit to sections of the New Hampshire corporation law designed to prevent corporate action having the effect of diverting corporate assets to shareholders, and thereby violated Article 4, § 1 of the United States Constitution. The public interest requires that the many New Hampshire corporations transacting business in Massachusetts and the creditors and stockholders of such corporations enjoy, in the Massachusetts courts, the protection afforded them under New Hampshire law.

II. STATEMENT OF PRIOR PROCEEDINGS

Plaintiff-appellee Sidney Anderson, an officer, director and twenty percent stockholder of KGM, filed suit in Norfolk Superior Court on September 12, 1973 seeking specific enforcement of an alleged agreement between himself and KGM dated August 15, 1972. The case was tried on June 20 and June 23, 1975. On August 6, 1975 the Superior Court issued findings, rulings and an order for judgment. The judgment entered on October 28, 1975 specifically enforced the alleged contract and required KGM to pay Sidney Anderson $100,000 upon tender of Sidney Anderson's

shares of KGM stock. KGM thereafter filed a motion for a new trial which was denied.

Following denial of its motion for a new trial, KGM appealed the Superior Court decision to the Appeals Court. On May 30, 1978 the Appeals Court entered an opinion affirming the judgment of the trial court. On June 9, 1978 KGM filed a Petition for Rehearing pursuant to Rule 27 of the Massachusetts Rules of Appellate Procedure. The Appeals Court has not yet acted on the Petition for Rehearing.

III. STATEMENT OF FACTS RELEVANT TO THE APPEAL

The alleged agreement which was the subject of the order for specific performance entered by the Superior Court provided that in exchange for the twenty percent of the common stock of KGM owned by Sidney Anderson and Sidney Anderson's resignation as an officer and director of KGM, KGM would pay Sidney Anderson $100,000. (App. at 15-16). The consideration Sidney Anderson was to receive exceeded the value of his common stock in KGM. The unaudited balance sheet of the Corporation dated July 31, 1974 shows that KGM's shareholders' equity was $94,715 of which $64,817 was retained earnings. (App. at 29). The balance sheet dated December 31, 1975 shows shareholders' equity of $129,744, of which $68,661 was retained earnings. (App. at 74). The company was not operating at a profit as shown by the December 31, 1975 balance sheet. (App. at 75). The financial condition of KGM would appear to indicate that a considerable portion of the consideration to be paid to Sidney Anderson was for his resignation as a corporate officer and director.

The judgment of the Superior Court, on the record before the Court, requires KGM to purchase Sidney Anderson's stock, notwithstanding that the purchase in accord-

ance with the lower court order, would, under the facts as set forth in the record, exceed KGM's capital surplus and render it unable to discharge its liabilities. This would violate New Hampshire Rev. Stat. Ann. c. 294, § 28, which prohibits a corporation from purchasing its own capital stock except out of earned surplus or, in some circumstances, capital surplus. Enforcement of the agreement by the Court would also require KGM to violate New Hampshire Rev. Stat. Ann. c. 294, § 101, which prohibits a corporation from purchasing its capital stock if the purchase would leave the corporation with insufficient property for the payment of its debts.

IV. POINTS ON WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether under New Hampshire law the agreement is void as against public policy because it provided payment to an officer and director for the resignation of his corporate offices.

2. Whether the repurchase agreement is unenforceable since enforcement would result in violation of New Hampshire law.

3. Whether the court violated Article 4, § 1 of the Constitution of the United States by failing to give full faith and credit to New Hampshire Rev. Stat. Ann. c. 294, §§ 28, 101.

V. APPROPRIATENESS OF FURTHER APPELLATE REVIEW

Further appellate review is appropriate in the public interest and in the interest of justice because the opinion of the Appeals Court would violate the full Faith and Credit Clause of the Constitution of the United States (Article IV, Section I), and raises an obstacle to New Hampshire corporations doing business in Massachusetts

and those dealing with such corporations. The primary errors of the Appeals Court in construing New Hampshire corporate law were: (1) not ruling that the repurchase agreement was void because it provided compensation to an officer and director for the resignation of his corporate offices; and (2) not ruling that the repurchase agreement would result in a violation of New Hampshire Rev. Stat. Ann. c. 294, §§ 28, 101.

It is well-settled that although directors and officers may resign, they may not accept compensation for their resignation because such conduct would be a breach of trust. 2 Fletcher's Cyclopedia of Corporations, § 348 ("directors cannot accept payment in any form or guise for their resignation"). See also, *T. F. Pagel Lumber Co.* v. *Webster,* 285 N.W. 739 (Wisc. 1939), and *Ballantine* v. *Ferretti,* 28 N.Y.S.2d 668, 680-81 (1941).

In *Ballantine* v. *Ferretti, supra,* the court held void as against public policy payment to directors both for the sale of their stock and for resignation from their offices. In so holding the court stated:

> "Contracts by which corporate officers or directors take pay for their actions as such have such harmful potentialities that they are condemned as contrary to public policy because of their nature and general tendency, without inquiry in any given case as to whether harm in fact resulted or complaint actually is made." 28 N.Y.S.2d at 680.

As indicated by the KGM balance sheets, enforcement of the repurchase agreement would compel KGM to pay for the stock from sources other than its capital surplus and earned surplus, thereby rendering KGM unable to discharge its liabilities. Under such circumstances the agreement is unenforceable because it would violate the New Hampshire Rev. Stat. Ann. c. 294, §§ 28, 101. The Superior Court, as well as the Appeals Court, apparently considered

the relevant time as being the time of execution of the agreement. This is contrary to numerous authorities which hold that the relevant time for determining whether a repurchase of stock would render a corporation insolvent is the time of performance. *See e.g., McConnell* v. *Butler's Estate,* 404 F.2d 362, 366 (9th Cir. 1968); *In re Dauson Bros. Construction Co.,* 218 F.Supp. 411, 412-13 (N.D.N.Y. 1963); *Cutter Laboratories, Inc.* v. *Twining,* 221 Cal. Rptr. 317, 323 (1963). Therefore, KGM carried whatever burden of proof it had.[1]

The Appeals Court held that New Hampshire Rev. Stat. Ann. c. 294, §§ 28, 101, were inapplicable because a defense based upon the violations of those statutes could not be raised by the corporation. (Opinion at 8-10). The apparent rationale for this ruling was that these statutes were enacted solely to protect the rights of creditors. The Appeals Court cited no New Hampshire authorities to support this construction of the New Hampshire statutes. New Hampshire law is to the contrary. The purpose is to protect both stockholders and creditors. In *Currier* v. *Lebanon Slate Co.,* 56 N.H. (I Hall) 262 (1875), the New Hampshire court held that a shareholder may enjoin an insolvent corporation from using its funds to buy the shares of one of its stockholders. The court said:

> "The funds of an involvent corporation cannot be taken to buy in a portion of its capital stock at the expense of its remaining stockholders. *It would be grossly inequitable to the other shareholders and a fraud upon the creditors.*" 56 N.H. at 267-68 (emphasis supplied).

New Hampshire has an important public interest in preserving the existence and viability of its domestic corporations which provide goods and services as well as employment to its citizens. Massachusetts has a similar interest in the viability of New Hampshire corporations since the employment opportunities and goods and services of such corporations also apply to the benefit of Massachusetts citizens. New Hampshire Rev. Stat. Ann. c. 294, §§ 28, 101, is intended to preserve the corporation's viability and existence.

[1] See, *Reith* v. *University Housing Corp.,* 247 Mich. 104, 225 N.W. 528, 529 (1929), which held the burden of proof as to financial condition to be upon the party seeking enforcement of the contract.

The decision of the Appeals Court transgressed the Full Faith and Credit Clause of the United States Constitution by failing to enforce the New Hampshire Statutes. Article 4, § 1 of the United States Constitution requires that "Full Faith and Credit shall be given in each State to the *public Acts,* Records and Judicial Proceedings of every other State. [emphasis supplied]."

The United States Supreme Court has held that a state's statutes are "public Acts" within the meaning of Article 4, § 1. *Carroll* v. *Lanza,* 349 U.S. 408, 411 (1955); *Bradford Electric Light Co.* v. *Clapper,* 286 U.S. 145, 155 (1932). In *Bradford Electric Light Co.* v. *Clapper, supra,* the court held that the full faith and credit clause requires the forum state to allow all substantive defenses permitted by the law of the state under which the action is brought.

> "A state may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstance here presented submits the defendant to irremedial liability. This may not be done." 286 U.S. at 160.

However, this was precisely what the Appeals Court did by refusing to allow KGM to invoke the substantive de-

fenses allowed by New Hampshire Rev. Stat. Ann. c. 294, §§ 28, 101.

The situation in the case at bar is similar to that which occurred in *Bishop* v. *Middle States Utilities Co. of Delaware,* 282 N.W. 305 (Iowa 1938). That decision involved the attempt of a shareholder to obtain specific enforcement of a contract for the corporation to purchase her stock. The Supreme Court of Iowa reversed a lower court decision which ordered specific enforcement of the contract in contravention of a Delaware statute which provided that a corporation could not repurchase its stock under circumstances which would impair its capital. In so ruling, the Iowa Supreme Court held that the Full Faith and Credit Clause required the lower court to enforce the provisions of the Delaware statute which prevented the corporation from repurchasing its stock. Similarly, in the instant case, the court was required to rule that the New Hampshire statutes prevented KGM from carrying out the repurchase agreement because of the requirement that it give full faith and credit to the New Hampshire Statutes.

The erroneous rulings of the courts below, if not reversed by this Court, would adversely affect New Hampshire corporations doing business in Massachusetts. A New Hampshire corporation is required to act in accordance with New Hampshire corporate law wherever it is doing business. *Borg* v. *International Silver Co.,* 11 F.2d 147 (2nd Cir. 1925). However, if the Appeals Court decision becomes *stare decisis* in this state, New Hampshire corporations doing business in Massachusetts will be subject, in Massachusetts, to a different interpretation of the law under which they are franchised than applies in their home state. Such a result is inappropriate.

CONCLUSION

For the foregoing reasons, it is in the public interest that this Court grant the application of KGM for further appellate review.

Respectfully submitted,

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